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Washington, DC 20009
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July 11, 1991

Mr. Michael Remington
Subcommittee on Intellectual Property
and Judicial Administration
House Committee on the Judiciary
CHOB-207
U.S. House of Representatives
Washington, DC 20515

Dear Mike:

Thank you for faxing the letter from MPAA to me yesterday. For your information, I am forwarding the CRT's decision concerning network participation in the satellite carrier royalty fund.

I hope this information helps you.

Sincerely yours,

Robert Cassler

Robert Cassler
General Counsel

Enclosure

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966

July 10, 1991

FRITZ E. ATTAWAY
SENIOR VICE PRESIDENT
FOR GOVERNMENT RELATIONS

The Honorable Bill Hughes
341 Cannon House Office Building
Washington, D.C. 20510-3002

Dear Congressman Hughes:

Recently the Copyright Royalty Tribunal ("CRT") determined that network program owners are entitled to share in the satellite carrier royalty fund under 17 U.S.C. Section 119. 56 Fed. Reg. 20,414 (May 3, 1991). This determination was based on a reading of Section 119(b)(3) that was inconsistent with the overall structure of Section 119 and congressional intent in establishing the satellite carrier compulsory license.

The CRT relied on the language of Section 119(b)(3) which states that satellite carrier royalties shall be distributed "to those copyright owners whose works were included in a secondary transmission for private home viewing made by a satellite carrier." Because that language does not expressly exclude network program owners from distribution, the CRT concluded they are entitled to seek satellite carrier royalties. 56 Fed. Reg. at 20,416. In reaching its conclusion the CRT overlooked the history and structure of Section 119 as a whole and chose to ignore "the plain and clear language of the House Energy and Commerce Committee Report which states that network program owners shall not be eligible for satellite carrier royalty fees." Id.

Looking solely at the language of Section 119(b)(3), as the CRT did, does not reveal congressional intent for satellite carrier royalties. The language now in this subsection appears to have resulted from oversight, rather than from a conscious decision to permit royalty distribution to network program owners. The Satellite Home Viewer Act was first

introduced in the 99th Congress as H.R. 5126, and later incorporated into H.R. 5572. This bill created a compulsory license for satellite carriage of independent stations only. The original version of Section 119(b)(3) thus did not need to exclude network program owners from distribution because independent stations do not carry network programs.

When this bill was reintroduced in the 100th Congress as H.R. 2848, much of the language from the earlier bill was carried forward without change. The language of what is now Section 119(b)(3) remained unchanged. Likewise, the monthly royalty rate (now found in Section 119(b)(1)(B)) was 12 cents per subscriber for any station -- the same rate as found in the earlier bill. The scope of the compulsory license had been changed, however, to encompass network as well as independent station carriage. Thus, as originally introduced, H.R. 2848 would have required a monthly royalty fee of 12 cents per subscriber for both network and independent stations.

Congress changed the royalty rate for network stations in a manner that shows it did not intend royalties to be paid for network programs. The monthly rate for network stations was reduced to three cents per subscriber, while the monthly rate for independent stations remained at 12 cents per subscriber. In setting this rate differential, Congress stated that the fees "approximate the same royalty fees paid by cable households...and are modeled on those contained in the 1976 Copyright Act" for the cable compulsory license. H. Rep. No. 887 (II), 100th Cong. 2d Sess. 22 (1988).

In setting rates for Section 119, Congress used the same 1/4 rate for network stations as compared to independent stations found in the cable royalty rate plan because "the viewing of non-network programs on network stations is considered to approximate 25 percent" of the viewing of non-network programs on independent stations. The lower rate for network stations reflects the lower amount of non-network programs on those stations.

The rate differential in Section 119(b)(1)(B) reflects congressional intent that no royalties be paid for network programs, which make up the bulk of the programming on network stations. Because no royalties are paid for network programs, it follows that no royalties are available for distribution to network program owners. Yet, the CRT's ruling would allow distribution to network program owners in contravention of the structure of the congressional plan.

In its ruling, the CRT substituted its own rationale for that of Congress in determining that network program owners should be compensated. According to the CRT, "the disparity in rates can be attributed to the desire of Congress to establish the same payment level for satellite carriers as for cable, thereby avoiding unfair interindustry competition." 56 Fed. Reg. at 20,416. This purpose is not the one expressed by Congress (quoted above) as the reason why the rate differential was set. The CRT cannot, of course, substitute its own justification for that given by Congress.

The CRT also stated that the policy behind the cable rate disparity -- "that network programs have already been compensated" -- "does not apply for satellite carriers, because they are retransmitting network signals to 'white areas' only." Id. This rationale is completely at odds with the legislative history of Section 119, where Congress determined that network program owners should not be compensated for "white area" carriage of network programs:

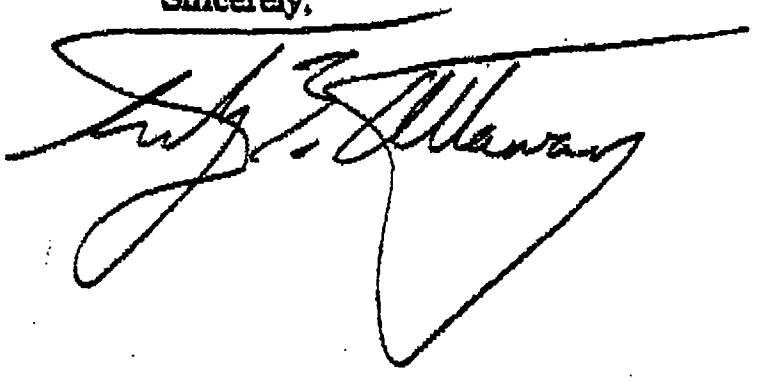
The copyright owners of these non-network programs would be entitled to receive compensation for the retransmissions of the programs to "white areas."

> Owners of copyright in network programs would not be entitled to compensation for such retransmissions, since those copyright owners are compensated for national distribution by the networks when the programming is acquired.

H. Rep. No. 887 (II) at 23 (emphasis added); see also 134 Cong. Rec. H10472 (1988) (Rep. Markey) (same)1

In sum, the legislative history and structure of Section 119 do not support the CRT's decision to allow network program owners to claim for satellite carrier royalty distribution. MPAA would ask the Committee to review this matter and, if appropriate, to consider legislative revisions to ensure that the law is enforced in a manner consistent with Congress' original intentions.

Sincerely,



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1 Network representatives indicated that they were not seeking any compensation for "white area" carriage of network programs. Satellite Home Viewer Copyright Act: Hearings on H.R. 2848 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st and 2d. Sess. 213 (Mr. Rogers of NBC), 241 (Mr. Malarast of CBS) and 298 (Rep. Kastenmeier) (1989).

ONE HUNDRED SECOND CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

DATE: 7/1 TIME: 4:30

TO: Robert Cresler

673-5407

FROM: Mike

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

FAX # (202) 225-3737

TELEPHONE # (202) 225-3926

NUMBER OF PAGES (INCLUDING THIS PAGE) 5

MESSAGE:

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